

**SPECIAL STIPULATIONS IN THE
CONTRACT OF MARRIAGE:
LAW AND PRACTICE IN THE OCCUPIED WEST BANK**

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1. Introduction

The Palestinian population of the West Bank, occupied by Israel since 1967, are governed in matters of Islamic family law by the Jordanian Law of Personal Status (JLPS) 1976 applied in the West Bank *shari'a* courts within the communal (*millet*) system of religious courts. Jordanian legislation in matters under *shari'a* jurisdiction has continued from the period of Jordanian rule prior to the Israeli occupation. The current law replaced the Jordanian Law of Family Rights (JLFR) 1951, the first of a series of codifications of family law issued in Arab states in the 1950's. The JLFR built on the Ottoman Law of Family Rights (OLFR) of 1917 which in Palestine was given legal effect by the British Mandate authorities¹ and reflected the dominance of the Hanafi school of law in the Ottoman Empire. In its turn, the JLPS builds on the JLFR in adopting some Egyptian-inspired innovations from the 1940's not taken up in the 1951 law, and drawing on Syrian approaches in the 1953 Syrian Law of Personal Status in other areas, including an adaptation of the innovatory Syrian provision for compensation for arbitrary divorce. The JLPS has provisions drawn from all four classical Sunni schools of law, but the Hanafi school continues to be the most prominent and continues to be the formal reference should there be no explicit text in the code.

In the matter under discussion, special stipulations in the contract

of marriage, the original rules on which the Jordanian provisions are based are not taken from the Hanafi school but are of Hanbali origin. Special stipulations provide the opportunity for limited modification of the rules governing the balance of rights and duties of the spouses in a Muslim marriage - a balance that remains, in the JLPS, reflective of a solidly patriarchal and patrilocal concept of marriage and the family.

2. Positions of the Sunni schools of law on special stipulations

The classical jurists were of one mind in considering valid any stipulations that reinforced something already required by dint of the marriage contract - for example, a stipulation to the effect that the husband should treat the wife well, or that he should not take over her property.² On the validity of stipulations that did not fall into this category, however, they differed. The Shafi'is and Malikis classified stipulations into three categories: broadly, stipulations upholding the regular terms of the contract, which they held to be valid; irregular stipulations which were cancelled, leaving the contract valid; and void stipulations which caused the voiding of the contract.³ The Hanafis recognised as valid only those stipulations that reinforced something already required by the contract and by marriage, or those that were expressly permitted; these were "enforcable" only if remedies existed in the classical rules for the violation of the existing rule that was being reinforced.⁴ Any other stipulations were regarded by the Hanafis as having no legal value. They distinguished between stipulations that it was forbidden to fulfil, since they contradict the basic presumptions of marriage (such as that the wife should have no dower) and those might be legitimately and voluntarily fulfilled - for example, not to take another wife for the duration of the marriage. In the latter type, the Hanafis held that there was no obligation for them to be fulfilled, and no remedy if they were broken.

The Hanbalis were alone among the Sunni schools to give legal value to stipulations other than those reinforcing the standard rules arising from the contract of marriage.⁵ The Hanbalis divided stipulations into valid and invalid and then subdivided according to nature and effect. Valid stipulations were those reinforcing the normal requirements of the contract and also anything that was not against the requirements of the contract or the fundamental intentions of marriage. This category included for example a stipulation that the man should not take another wife, or should not make his wife leave her home town. The Hanbalis held these stipulations to be binding, in the sense that breach thereof constituted breach of the contract, and the injured party could seek dissolution of the marriage. Invalid stipulations were divided by the Hanbalis into those causing the voiding of the contract - principally, those that turn the contract into a temporary or *mut'a* marriage;⁶ and those stipulations which are themselves void but leave the contract intact. The latter are stipulations contradicting the requirements of the contract, such as that the woman should have no dower.

3. Legislative history of stipulations in the area

The legislative history of stipulations in the marriage contract in Palestine began with the OLFR which used the Hanbali position to justify a provision that allowed the woman to stipulate that she would be divorced if her husband married another wife while still married to her.⁷ This was as much an extension of the Hanafi rules on delegated or suspended *ṭalāq* as an adoption of the Hanbali position on conditions, particularly as it was so limited, but the emphasis on the form, as a stipulation, was backed up by Article 61 of the OLFR, which stated that if stipulations inserted at the time of the contract for the benefit of one of the parties were not respected, the marriage was irregular. There was no clarification of what kind of stipulations

would be allowed beyond the specific provision mentioned above, nor of what the procedure would be in the event of one being broken; nor indeed if this was in fact meant to be constrained by the earlier article. Nevertheless, it pointed the way for the selection (*takhayyur*) of the wider Hanbali position on this subject in many of the Arab codes of personal status law later in the century.

In 1951, the Jordanian legislators included in the JLFR the provision that if a stipulation “to the benefit of one of the parties” were inserted in the contract of marriage, then were it to be violated the marriage could be dissolved (*faskh*) at the petition of the wife. This rather shortened version of the Hanbali position⁸ in the JLFR was considerably expanded with the promulgation of the JLPS in 1976. The JLPS text drew in more of the original Hanbali distinctions and gave more examples than the JLFR had provided. The JLPS also makes the use of stipulations explicitly open to both spouses and details the effects on each spouse should the other violate a stipulation. The JLPS text is worth quoting in full:

If a condition is stipulated in the contract that is of benefit to one of the parties, is not inconsistent with the intentions of marriage, does not impose something unlawful and is registered in the contract document, it shall be observed in accordance with the following:

i) if the wife stipulates something to the husband that brings her a benefit that is lawful and does not infringe upon the right of the other, such as if she stipulates that he shall not remove her from her town, or that he shall not take another wife during their marriage, or that he shall delegate to her the power to divorce herself, or that he shall settle her in a certain area, this shall be a valid and binding condition, and if the husband does not fulfil it, the contract shall be dissolved at the application of the wife and she may claim from him all her matrimonial rights;

ii) if the husband stipulates to the wife a condition that brings him a benefit and does not infringe upon the rights of the other, such as if he stipulates that she shall not go out to work, or that she shall live

with him in the area in which he works, this shall be a valid and binding stipulation, and if the wife does not fulfil it, the marriage shall be dissolved at the application of the husband and he shall be exempted from paying her deferred dower and maintenance during the ‘*idda* period;

iii) if the contract is constrained by a condition that contradicts the intentions of marriage or imposes something unlawful, such as if one of the spouses stipulates that the other shall not live with him/her, or that they shall not share marital intimacy, or that one of them shall drink alcohol, or shall break off relations with their parents, then the condition is void while the contract remains valid (article 19).

The Explanatory Memorandum to the JLPS stated that the Hanbali position had been adopted in the public interest (*maṣlaḥa*) and the stipulations provided for made binding (*mulzim*).⁹ The provision includes two standard Hanbali constraints: that the benefit obtained by the party inserting the stipulation is not something expressly forbidden by the *shari‘a*, and that it does not affect the right of others.¹⁰ It is interesting to note the logical direction of the examples of lawful stipulations for the respective spouses given in the text. The examples for those that a woman may legitimately make all imply a change in existing legal presumptions on what the wife shall and shall not do or be subject to - thus, for instance, exempting her from the duty of moving to live with her husband wherever he goes, giving her the power to unilaterally end the marriage, or giving her a say in or a remedy to the husband’s exercise of his right to contract a polygamous union. The stipulations that a husband may make, on the other hand, are illustrated by examples that reinforce the weight of presumptions that still exist to a large extent in law, but which to varying extents are being challenged in practice. It is no longer to be assumed, for example, that the wife will be wholly engaged in non-waged domestic labour, or indeed that this is necessarily preferable to her participation in the wage-earning labour force, nor is it to be assumed that she will be willing to move wherever her husband goes.

For the husband, besides clarifying the terms of his marriage, the insertion of such stipulations would in theory provide the option, in the event of the wife's non-fulfilment of the condition, of seeking dissolution of the marriage without being liable to pay his wife's remaining financial claims upon him - her deferred dower and maintenance for the *'idda* period. While a wife divorced for reasons constituting "disobedience" is not due maintenance for the *'idda* period, she would otherwise lose her right to deferred dower only where she explicitly agrees to waive it in return for release from the marriage in a *mukhāla'a* arrangement, or where she loses all or some of it as a result of the apportioning of blame by the arbiters in a claim for separation on the grounds of *nizā' wa shiqāq* ("discord and strife").

For the woman, the insertion of written stipulations in the contract of marriage offers the opportunity of protecting a certain degree of freedom of choice: choice of where she lives, or of participating in the waged labour force for example, without being liable to be held "disobedient" for exercise of this choice. However, in the case of the husband's violation of the stipulation, the choice ultimately is acceptance of the circumstance stipulated against or the ending of her marriage. Stipulations in the marriage contract are binding (*mulzim*) but not enforceable as such; they do not prevent the establishment in fact or in law of the situation stipulated against, but give the wife a way out if her apprehensions are realised. Thus, if a woman wishes not to become involved in a polygamous marriage, for example, she may stipulate that her husband shall not take another wife while still married to her; this stipulation is not enforceable in the sense that any subsequent marriage he may conclude is voidable, but it is binding in that such an action constitutes breach of contract and she at least has the choice of not remaining in the polygamous union, through applying for dissolution of the contract. In the case of some other stipulations, the stated remedy of dissolution may not be immediately available but rather have a place in existing remedies; this is likely to

be the case for example with a stipulation regarding where the wife wishes to live.

4. Practice: stipulations in West Bank marriage contracts

In practice, the insertion of stipulations in the marriage contract is very much the exception to the rule in the West Bank. The effect of the expanded text of Article 19 of the JLPS does not appear to have encouraged increased use of stipulations in the West Bank. An examination of over 8500 marriage contracts registered in the three West Bank courts of Ramallah, Bethlehem and al-Khalil (Hebron) in the three years of 1965, 1975 and 1985 revealed a total of 129 contracts containing special stipulations - an overall proportion of 1.5%, with no increase in use in the material examined after the introduction of the expanded text in the JLPS in 1976.

The subject most commonly addressed in the stipulations appears at first glance to be property: over 50 of the stipulations in the material examined came in al-Khalil in one year and contained references to property of the wife's probably intended as the *tawābi'* (or "effects") of the prompt dower.¹¹ In this sense, they were not "stipulations" as such, and in the other courts, and in al-Khalil in the other records studied, such items are registered in the *tawābi'* section. Taking out from the total the stipulations inserted as a result of this particular practice in 1975 would take the overall proportion of contracts with stipulations in the material examined to just 0.9%.

Nearly all the stipulations were made by women. The insertion of stipulations may arise from specific apprehension on the part of the bride's family vis-a-vis the groom - for example, if he is much older than the bride, or if they fear he is likely to emigrate. Even so, many families are likely to shy away from making written stipulations in the contract session, and rather to obtain oral assurances. Two points are often made to explain why such little use is made of stipulations:

firstly, the *shar'i* position that the rights of women are fully protected by the *shari'a* and adequate remedies already exist for such grievances as she may develop later in her marriage; and secondly that it is preferable for spouses to be able to have mutual understandings on such matters (without it having to be in writing) and to talk about any problems as they arise.

Besides the stipulations on property mentioned above, the most common subject of stipulations inserted by women in their contract of marriage in the material examined was her place of residence, followed by the nature of her accommodation - that is, independence of dwelling - and the issue of the husband taking another wife. There were also several stipulations regarding the right of the woman to go out to work, and the delegation to the woman of the power to divorce herself from her husband. Other subjects covered by stipulations in the contracts examined included travel abroad by the husband; disposal of the wife's earned income; continuation of the wife's university education; guarantors for the wife's dower; and provision for children from a former marriage. The only stipulations made by men in the case material involved an undertaking to pay a cash sum to the wife should the groom not treat her well, and the stipulation that the wife raise any children from the marriage herself.

The stipulations made by women fall into two categories; those that provide a remedy, and those that do not. Both these categories can be subdivided. The type of stipulation that provides no remedy either appears as a clarification on a certain aspect of the marriage, strengthening the woman's defence against standard claims by the man, largely for "obedience"; or as straight statements that the husband may not take a certain action. The latter type may serve a function similar to the "clarification" type, but in some cases the legal value may be disputed.

In the other type, the remedies reserved by the woman consist either of the power to divorce herself, or of a cash sum to be paid her by the husband. Both these are clearly intended to deter the

occurrence of the specified action by the man, but the second can act only as a deterrent rather than providing also a way out of the situation - except perhaps in that the husband might himself divorce the wife before taking the specified action in order to avoid having to pay the sum of money in addition to her financial rights on the end of the marriage by *ṭalāq*.

The exception to these two types of stipulations, which both identify specific circumstances, is the assumption by the wife of the power of *ṭalāq*, not linked to a particular action by the husband.

5. Sample areas: delegation of divorce, stipulations against polygamy, stipulations regarding the wife's residence

The remainder of this paper will consider in detail the delegation of divorce to the wife by the husband; stipulations related to polygamy and stipulations related to the place of residence of the wife.

In the contracts, as in the text of the JLPS, the phrasing of a condition delegating the power of divorce to the wife is that "her power/affairs/protection be in her hand" (*'uṣmatuhā bi yadihā* or *amruhā bi yadihā*) to divorce herself from her husband. The phrasing is indicative of the fact that this is the standard Hanafi process of the delegation of *ṭalāq* (*tafwīḍ at-ṭalāq*) to the wife by the husband; as such, the Hanafis always recognized this stipulation as valid, not regarding it however as a stipulation but as a delegation of *ṭalāq*.¹² Thus, the husband delegates his power of divorcing his wife to the woman, so that she divorces herself from him (rather than divorcing him).

However, delegating the power does not mean delegating the procedure! Practice has established that a woman cannot simply pronounce the *ṭalāq*, whether in front of the court or out of court, followed by a simple registration in the *ṭalāq* records, but has to raise a claim to establish it or have the *qāḍī* effect the *ṭalāq* in court.

Furthermore, the literalistic approach of the local courts to the text of the *tafwīd* means that the woman may find that the delegation is invalid.

One of the problems that may arise is the question of when the wife may use her power. As a general principle, it is held that if the delegation is absolute and unconstrained, then the wife may exercise this power only in the same session it is delegated to her. That is, if the husband says “divorce yourself”, or “your affairs are in your hand”, then the wife must respond immediately, since the power ends with the end of the session.¹³ Thus, the question might arise, in the case of a stipulation in a marriage contract simply stating that “the wife’s affairs are in her hand”, as to whether that delegation would actually cease once the contract session were over. If, however, the delegation is suspended upon a condition, such as “if I marry another wife, your affairs are in your hand”, then she may exercise the power when the condition is realised. Thus, for example, in stipulation form in the marriage contract, the wife might stipulate that she have the power to divorce herself if the husband marries another wife, or goes to live abroad.¹⁴ A stipulation formula linking the delegation of *ṭalāq* to the specified condition, rather than simply stating the condition (for example, stating that the husband “shall not marry another wife”) puts the wife in a stronger position. While in theory she could seek dissolution (*faskh*) in the latter case for breach of the condition, if she had linked the condition to a delegated *ṭalāq*, she might be able to claim compensation for arbitrary *ṭalāq* as well as all her other matrimonial rights.

The delegation of *ṭalāq* to the wife may also be “suspended on a generalisation”, with the use of such phrases as “whenever you wish, in which case the delegated power may be used at any time by the wife.”¹⁵ Here, the problem also arises of whether the wife’s *ṭalāq* falls revocable, as would the husband’s, leaving open the possibility that her husband could then simply revoke the *ṭalāq*. West Bank jurist Muhammad Samara, in discussing the suspension of *ṭalāq*, lists the

words that may be used in phrases of suspension as “if” (*in, idhā*), “when” (*matā*), “anytime/whenever” (*kullumā*), and observes that none of these gives rise to repetition except the last one, *kullumā*.¹⁶ That is, if any of the other words were used (for example, “divorce yourself when you wish”), the wife would be able to use her delegated power of *ṭalāq* once only. If this *ṭalāq* were considered revocable, the husband could then revoke it and the wife would have gained nothing by the original delegation. With the use of “whenever” (*kullumā*), however, the wife could, if she chose, repeat her *ṭalāq* until the husband could himself no longer revoke it (i.e. three times) and thus irrevocably end the marriage by the *baynūna kubrā*.

The collected decisions of the Amman *sharī’a* Court of Appeal show a few decisions dealing with these matters that appear to back up Samara’s position. One held that if the wife stipulates that “her affairs are in her hand” and then seeks a ruling for *ṭalāq*, it will fall revocable.¹⁷ Another case involved a woman stipulating that if her husband drank alcohol she would have the power to divorce herself from him when she wished (*matā shā’at*). He subsequently did drink, the woman divorced herself; he revoked the *ṭalāq* that she had pronounced and they resumed marital relations. The court ruled for the incidence of one revocable *ṭalāq* and a revocation.¹⁸

Since so few women stipulate the delegation of *ṭalāq* in their marriage contracts, and even fewer attempt to use it, there is relatively little case material, but certainly the inclusion of the possibility of repetition through the use of *kullumā* in the text of the delegation (for example, *matā shā’at wa kullumā irādat*) would mean that even if her *ṭalāq* were held to fall revocable, the woman would have the option of completing the process to the third and final *ṭalāq*, should she so choose.

The rather literalistic approach of the Jordanian and West Bank courts on this matter is demonstrated further in the only case that came to light in the case material examined where a wife sought to exercise her power of delegated *ṭalāq*. The woman had been married

a few months earlier to a man who had since left the country without consummating the marriage. The contract included the stipulation that the wife had the power to divorce herself when she wished (*matā shā'at*). The wife accordingly raised a claim for *taḥlīq* (implying the *qāḍī* would pronounce the *ṭalāq* for her) and the *qāḍī* registered the incidence of a single *ṭalāq* which fell immediately final because it was before consummation. Upon review in the Jerusalem *Shari'a* Appeal Court, however, this ruling was corrected and the *ṭalāq* not given, because 1) the text of the wife's stipulation in the contract did not include the phrase "and the husband agreed to this stipulation", and 2) in the final text of the contract as a whole, set out in full above the signatures of the parties, the stipulation was not mentioned in the *ijāb* or the *qubūl*; in this later position, the Jerusalem Appeal Court followed earlier rulings to this effect of the Amman Appeal Court, published by al-'Arabī.¹⁹

The rare use of the delegation of *ṭalāq* leads both to a lack of case material in the courts which might allow a clear position to be worked out, and to frequent defects in the few texts of delegation that are registered. The *ma'dhūn* who draws up the contract of marriage may not himself be aware of the implications of the precise words he uses to express the will of the parties to the contract. In several of the contracts studied that did include the husband's delegation of *ṭalāq* to his wife, the text of the delegation was such that it might well fail to afford the protection the wife had sought in having it registered - in some examples by not including the husband's consent to the condition in the text of the stipulation, and in others by not providing against the possibility of revocation by the husband. In order to ensure the effective use of the delegated *ṭalāq* if and when necessary, the text would have to read: "The wife stipulated to her husband that her protection be in her hand, to divorce herself from him whenever she wanted by a single final *ṭalāq*, and the husband agreed to this". This text would have to be repeated by both husband and wife in the full text of the conclusion of the marriage by the *ijāb* and *qubūl*.²⁰

Certain modifications included in draft amendments to the current Jordanian law are clearly the result of these questions arising from implementation of the current law. The Draft Law proposes to add a clause (d) to the present Article 19 on stipulations in the marriage contract, to read:

"If the wife stipulates against her husband that her affairs be in her hand, to divorce herself if she wishes (*idhā shā'at*), then the *ṭalāq* may occur from her only through a court action, and in this case it is final *ṭalāq* (Draft amended Article 23)."

The Explanatory Memorandum that accompanies the Draft Amended JLPS notes that if the woman's *ṭalāq* were to fall revocable, she would not be receiving the benefit intended by the delegation, and claims to be following the Hanafi school in making it automatically a single final *ṭalāq*.²¹ It goes on to explain that since the *ṭalāq* can only occur through court action, the woman will have adequate time to think over her action and to reconsider her decision during the court proceedings - just as a man has the *'idda* period to reflect on and possibly revoke his *ṭalāq*. Such an amendment would indeed ensure that more of the texts of delegation of *ṭalāq* would actually enable a woman so empowered to end her marriage should she so choose.

In the meantime, problems connected to the precise text of a stipulation arise less where the wife's right to divorce herself is tied as a remedy to the realisation of certain circumstances that she wishes to avoid; that is, when the stipulation suspends or gives rise to her power of *ṭalāq* only upon the occurrence of a specific event, such as the husband taking a second wife.

Besides the assumption of the general power of *ṭalāq*, the subject of a stipulation that has the longest legislative history in the area is polygamy, beginning with the OLFR. In the West Bank contracts examined, the stipulations on this subject included examples of those with and without remedies. The remedies included specific delegation

of the power of *ṭalāq* to the wife should the husband either take another wife or revoke the *ṭalāq* of a current wife within the *'idda* period. However, it was more common in the contracts reviewed for the woman to stipulate payment of a substantial sum of money in the eventuality of her acquiring a co-wife.²²

There are two points that have arisen in the courts in consideration of this last type of stipulation. The first is that the cash sum will not be payable until the woman has clarified whether or not it is intended as an increase in her dower; if so, the *shari'a* court could proceed, but if it was not intended as dower then the claim would transfer to the jurisdiction of the civil courts.²³ The other point is one that would have applied to all six of these stipulations: that the sum is payable even if the husband establishes that the wife consented to his taking a second wife, since the stipulation did not condition payment upon her consent to his action, but only upon the fact of his action.²⁴

Other stipulations in the case material on the subject of polygamy would be less clear in their legal effect. For example, a condition stipulating that the husband was "not permitted" (*lā yajūz lahu*) to take another wife without the consent of the woman making the stipulation might raise the issue of affecting the "right of the other", a constraint on the validity (or enforceability) of stipulations in the JLPS. Certainly a dissolution would be easier to obtain if the stipulation gave the wife the right to divorce if the husband took another wife; this is interpreted as not affecting his right to do so, yet giving her a remedy in response to his exercise of that right.

The court would be unlikely however to give legal value to a stipulation requiring the husband to divorce a woman to whom he was already married or failing that to pay a cash sum to the woman making the stipulation. For the Hanbalis, a stipulation by the wife that her husband divorce another wife was held void, while leaving the contract valid.²⁵ The Hanafis held it to have no value while the man was free to fulfil it if he wished. The OLFR of 1917, purporting to take up the Hanbali position on stipulations in the specific area of

polygamous unions, appears to have included this kind of stipulation as valid in relation at least to a future wife:

"If a man marries a woman and she stipulates to him that he shall not marry another wife and if he does then she or the second wife shall be divorced, then the contract is valid and the condition is to be observed (Art. 38 OLFR)."

The JLFR did not reproduce the OLFR example but included nothing to clarify the validity or otherwise of such a stipulation. The inclusion in Article 19 of the JLPS of the requirement that the stipulation should not affect the right of another conforms to the Hanbali position and renders invalid a stipulation affecting the right of another woman by giving rise to her divorce.

The other two examples of stipulations that the wife might make given in Article 19(i) of the JLPS both concern the place of residence of the wife - that her husband not make her leave her home town or village, or that he settle her in a certain place. The subject matter here is related to the husband's right to the "obedience" of his wife, which includes his right to call her to live with him wherever he chooses, so long as he is to be trusted with her; the JLPS adds in this regard "and so long as there is no stipulation to the contrary in the contract document".²⁶ With the greater mobility of modern society, and in particular in areas of the West Bank where emigration or at least work abroad is common due to the exigencies of local circumstances, there is an increased likelihood that the woman may find herself expected to move far away from her home area and therefore her own support network.

Provision for the woman to stipulate where she wishes to live was first made explicitly in the JLFR and repeated with added detail in the JLPS. The Hanbalis considered it a valid stipulation, with the option of dissolution available to the woman if it were broken; the Hanafis and Malikis gave it no legal value.²⁷ The Jordanian legislators

followed the Hanbalis in stating that if such a stipulation were agreed to and broken by the husband, the marriage could be dissolved on the petition of the wife.

The majority of stipulations on this subject made in the material examined in the West Bank specified the woman's home town or village as the place where she desired to spend her married life; the one exception simply stated the woman's right to choose the place and in this sense may have been too general to be of much effect. However, this exception was the same as the others in that no remedy was specified in the case of the husband breaking the agreement, and the nature of the stipulations thus appears to be that of clarifying the groundrules for the forthcoming marriage for the sake of the parties. Several of the stipulations employ phrasing such as "he shall not make her live anywhere apart from "X" without her consent". An Amman Appeal Court decision of 1963 established that if the woman did move to live elsewhere than the place she had stipulated, she retained the right to withdraw her consent at any time and to exercise her right in realising the condition".²⁸

However, quite what "realising the condition" means in this context is not clear. When awards of *tā'a* (obedience) were enforceable, such a stipulation could presumably have been of effect in preventing the forcible conveying of the wife to her husband's house. However, since the promulgation of the JLPS in 1976 there is no provision for forcible execution of a ruling for "obedience" against the wife. It would seem that the wife can only claim for dissolution when the husband breaks the stipulation - that is, when he has settled her outside the area she specified; and as the main objective for most women is not to leave the area in the first place, they would probably be unlikely to go with him when he leaves. That is, the stipulation would more likely be used as a pretext for not accompanying the husband rather than as grounds for dissolution after she has accompanied him. In what would appear to be a rather anomalous decision in this regard the Amman *Shari'a* Court of Appeal ruled in

1974 that in a claim for separation on the grounds of absence and injury, a stipulation to the effect that that the wife would only move out of her home area by her consent would not serve to rebut a man's defence that he had asked her to come and live with him and she had refused.²⁹ Two years later, the JLPS specifically constrained the requirement for the wife to move to live with her husband in the event of there being a stipulation the contrary.

In theory, under the current law, a woman might use the stipulation to refuse to go with her husband; he might then refuse to pay her maintenance on the grounds that she is "disobedient" or else call her to the "house of obedience" in his new place of residence. She could use the stipulation to establish a good defence to the "obedience" claim, continue to claim maintenance from him, and if he did not return to live with her, and she wished to end the marriage, could either obtain separation for non-payment of maintenance if he defaulted, or arguably for desertion (*hajr*) or absence and injury if he did not. If on the other hand the man divorced his wife, she would be entitled to seek compensation for arbitrary *ṭalāq* and the stipulation would deny him the defence that he had a good reason for his *ṭalāq* in that she had refused to come to live with him.

Similar to such stipulations are those treating the subject of the wife's domestic accommodation. This constitutes reinforcement of a right that already exists in Hanafi law - for the wife to live in "separate" accommodation. The rules on what constitutes a *shar'i* dwelling include that the wife is to have accommodation separate from either relatives or co-wives. Custom is moving from this being a separate room or set of rooms for the married couple in the man's family home to a separate dwelling. Al-'Arabī's second volume of collected rulings from the Amman *Shari'a* Court of Appeal includes decisions that trace the progress of a claim made in 1981 by a woman for dissolution due to her husband's violation of her stipulation that she live by herself. The first instance court had turned down the woman's petition for dissolution, on the grounds that the stipulation

was not one which had to be observed - the classical Hanafi position. The Appeal Court clarified that the stipulation in the contract required the man to accommodate her in a home on her own and that he had violated this by bringing a co-wife to live with her. The husband acknowledged the stipulation but claimed that the plaintiff had waived it and consented to her co-wife living with her. The case was referred back to the first instance court to take evidence on the husband's defence. The first instance court dismissed the claim again on the grounds that the documented text of the contract did not include the fact that the stipulation was made by the wife, nor the husband's acceptance of it. The woman returned to the Appeal Court, which held that the man had acknowledged the existence and validity of the stipulation and his acceptance of it during the course of the claim, and referred the case back for the first instance court to proceed with consideration of his defence again. No further details of the case are published, but al-'Arabī notes that the man was unable to prove his defence and the marriage was in fact eventually dissolved.³⁰

This is the only example in the published rulings from the Amman *Shari'a* Court of Appeal of dissolution on the grounds of violation of a stipulation and it gives some idea of the considerable procedural problems that such claims are likely to confront. The very low frequency of contracts with stipulations, with correspondingly little general knowledge of how they need to be phrased, and the even lower incidence of claims brought on the basis of such stipulations, no doubt contribute to these complications; and it remains the fact that the origin of the rules on stipulations are Hanbali and likely to be less familiar to the *shari'a* judiciary in the West Bank or Jordan than the Hanafi rules. The fact that it is women who make the majority of stipulations should come as no surprise, since it is women who are more likely to want explicit protection for certain aspects of their life as a spouse, or explicit extensions to their rights. It is rather more surprising that so few stipulations are made. Traditionalism in these matters and consequent general antipathy to the idea may be largely

responsible, but it is also undoubtedly the case that many women are simply unaware that the insertion of stipulations in the contract of marriage, while not affecting the fundamental balance of rights and duties between the spouses, can in some cases qualitatively modify or constrain their impact.³¹

Notes

1. In the Muslim Family Law (Application) Ordinance 1919. See C. A. Hooper, *The Civil Law of Palestine and Transjordan*, Jerusalem Volume II (1936), p. 59.
2. See M. Samara, *Sharḥ muqārīn li qānūn al-aḥwāl al-shakḥīya* (Comparative Commentary on the Law of Personal Status), Jerusalem 1987, p. 123; and M. Sirtawi, *Sharḥ qānūn al-aḥwāl al-shakḥīya al-urdunī* (Commentary on the Jordanian Law of Personal Status), Volume I (On the Contract of Marriage and its Effects), Amman 1981, p. 112.
3. Samara, 1987, pp. 123-125 and 112-113.
4. Thus in the Hanafī school not many stipulations would have been enforceable. A stipulation for the man to pay his wife maintenance, for example, reinforcing the existing rule, was of little additional use before a Hanafī judge since they did not recognise *tafriq* for no maintenance.
5. Samara, 1987, 128, cites a *ḥadīth* on which the other schools based their non-recognition of all other stipulations. See M. Y. Mūsā, "The Liberty of the Individual in Contracts and Conditions According to Islamic Law", *Islamic Quarterly*, 2 (1955), no. 2, pp. 79-85 and 2 (1955), no. 4, pp. 252-263; cf. p. 79, for the Quranic basis of the Hanbali position, including "O ye who believe, fulfil your undertakings!"
6. Or a *muhallil* marriage, where a woman is married to a man with the express condition that she is to be divorced by him promptly and that the intention is purely to make her lawful again to her former husband. Samara, 1987, p. 127.
7. OLFAR Article 38. See below.
8. Article 21 of the JLFR provided as follows: "If in a contract of

marriage a stipulation is made that is to the benefit of one of the parties - for example, if it is stipulated that the bond of marriage is in the hand of the wife, or that the husband will not take her out of the town in which they have agreed to live, or that he shall not take another wife during their marriage - then it must be observed, provided that in the event of a denial, the condition is registered in the marriage document; if the stipulation is violated, then the marriage shall be dissolved (*faskh*) at the petition of the wife." This provision does not state explicitly that the stipulation must not violate the fundamentals of marriage or that the benefit must be lawful. Furthermore, although it does not identify the party who may make the stipulation, the provision ends by giving the recourse of an application for *faskh* in the case of violation to the wife only.

9. Explanatory Memorandum to the JLPS 1976, 2. The JLFR had not used the word "binding" (*mulzim*).
10. Literally, "the other's right", but this can be taken to mean the rights of the other spouse and of third parties such as the spouses' parents or another wife.
11. In brief, the *tawābi'* consist of items making up a specified cash value usually additional to the prompt dower. The cash is either delivered to the wife for her to buy items of the kind specified, usually gold jewellery or household furniture, or is used by the groom to buy the items which are then delivered to the wife.
12. Samara, 1987, p. 126 and Sirtawi, 1981, p. 112. According to Samara (p. 125), the Malikis would hold the inclusion of such a stipulation to invalidate the marriage before consummation, while if consummation occurred before the stipulation then the contract stands with the stipulation cancelled.
13. See for example M.H. al-'Arabī, *al-Mabādi' al-qadā'īya li maḥkamat al-isti'nāf al-shar'īya* (Legal Principles of the Shari'a Court of Appeal), Volume I (1951-1973) Amman 1973;

- Volume II (1973-1983) Amman 1984. 1973, p. 183, no. 16490/1970.
14. Compare A. Layish, *Women and Islamic Law in a Non-Muslim State*, Jerusalem 1975, 154. See also al-'Arabī 1973, p. 225, no. 9583/57 ff.
 15. See Articles 260 and 261 of the Code of Personal Status according to the School of Abū Ḥanīfa: the compilation of Muḥammad Qadrī Pasha, in the version contained in pp. 2-107 of S. Dahduh, I. Muhanna and M. Saysalim, *Majmū'at al-qawānīn al-filasṭīniya* (Compendium of Palestinian Laws) Volume 10 Jerusalem 1977. See also al-'Arabī 1973, p. 183, no. 16490/70 and Samara, 1987, pp. 274-275.
 16. Samara, 1987, p. 277.
 17. Al-'Arabī 1973, p. 183, no. 16490/70.
 18. Al-'Arabī, 1984, pp. 233 and 206, no. 19240/77
 19. The Amman appeal decisions state that for a stipulation on the delegation of *ṭalāq* to be valid, the wife must begin the formula of marriage including the stipulation in the text, followed by the *qubūl* by the husband. If the husband begins the *ijāb* or he makes it a condition on himself, it is not a valid delegation. See al-'Arabī 1973, p. 183, nos. 11181/60, 9583/57 and others.
 20. The Egyptian courts appear to have adopted a less literalistic approach. A case published by al-Jundī held that the expression *tutallaq nafsahā matā shā'at* was customarily believed to give the wife the power to end the marriage just as the husband could, so that the intention was clearly that either it should fall final, or she should be able to repeat it. A. N. al-Jundī, *Mabādī' al-qadā' al-shar'ī fī khamsīn 'ām* (Principles of Shar'ī justice in 50 Years) Cairo 1978, p. 710 (Tanta no. 3170/30).
 21. Explanatory Memorandum to the Draft Amended JLPS (1985), point 5.
 22. Compare Layish, 1975, p. 32.
 23. Al-'Arabī, 1984, pp. 207 and 173, no. 24042/83.

24. Al-'Arabī, 1973, p. 184, no. 17125.
25. Samara, 1987, p. 126, cites a *ḥadīth* attributed to the Prophet which the Hanbalis quoted in support of this position: *la yuḥill an tunkah imra'a bi ṭalāq ukhrā*, "a woman may not marry by the *ṭalāq* of another [women]".
26. Article 37 JLPS.
27. Samara, 1987, pp. 124 and 126.
28. Al-'Arabī, 1973, p. 185, no. 1182/1963.
29. Al-'Arabī, 1984, p. 207, no. 18004/1974.
30. Al-'Arabī, 1984, p. 206, no. 21910/1981 and p. 61, no. 22404/1981, 61.
31. To increase awareness on this subject among women in the West Bank, a pamphlet on special stipulations was recently published in a "know your rights" series by the Women's Centre for Social and Legal Advice: H. Rayān al-Bakrī, *al-Shurūṭ al-khāṣṣa fī 'aqd al-zawāj* (Special Stipulations in the Marriage Contract), Jerusalem 1992.